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IN THE

Supreme Court of the United States

No. 616

FEBRUARY TERM, 1950.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION for a Writ of Certiorari,
Petitioner,
against
THE CITY OF BUFFALO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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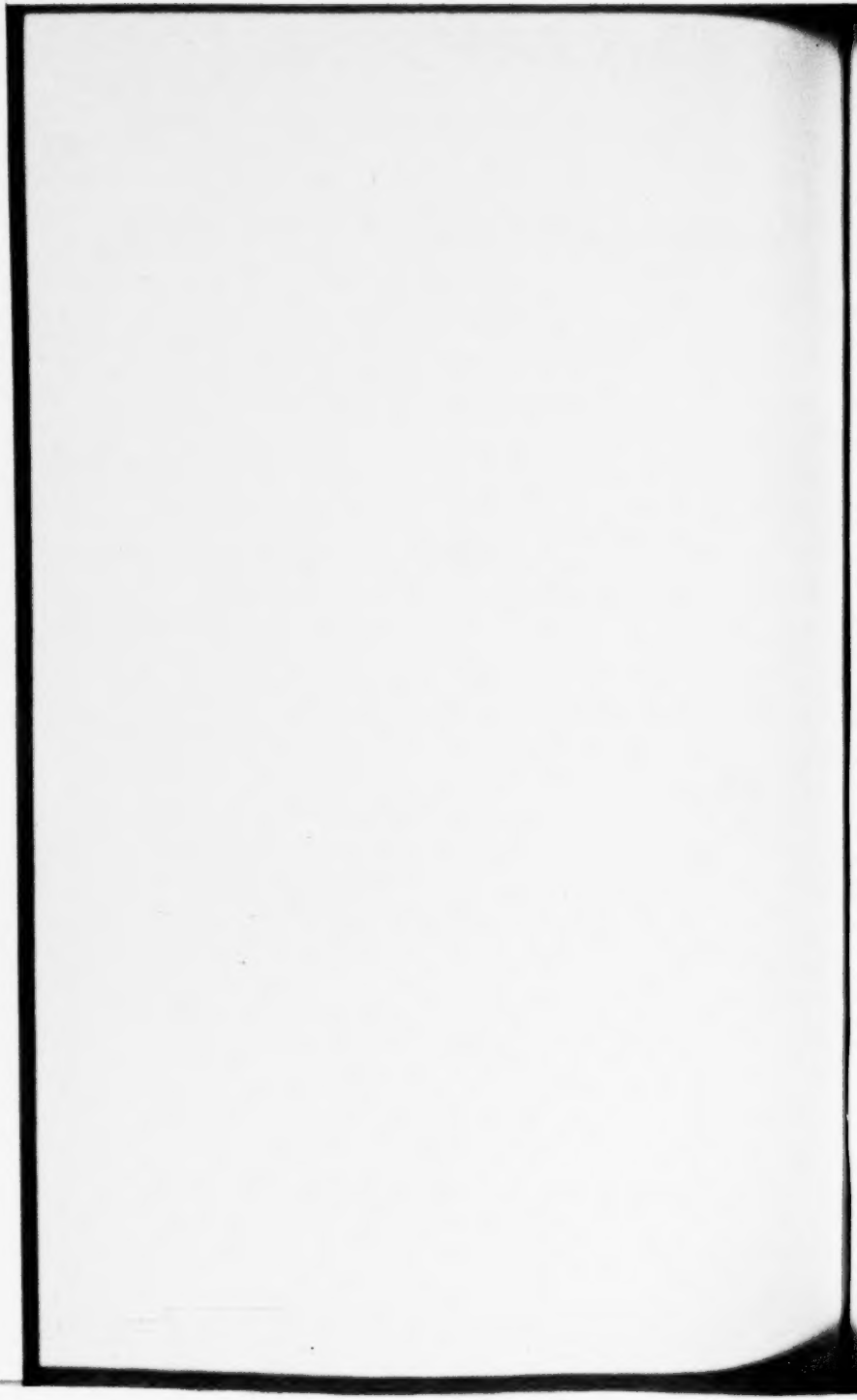

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IN THE

Supreme Court of the United States

No. .....

FEBRUARY TERM, 1950.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION for a Writ of Certiorari, addressed to the Judges of the Court of Appeals, Second Circuit,

Petitioner,

against

THE CITY OF BUFFALO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

And now comes the Plainfield Hotel Corporation of New Jersey, a real property holding corporation, and gives this Honorable Court to understand and be informed as below set forth, and on its own behalf as owner of an interest

in real property in the City of Buffalo near Houghton Park, makes this petition against the Honorable John Knight, Judge of the District Court of the United States for the Western District of New York, and against the other judges and officers of said Court and of the Court of Appeals for the Second Circuit, and represents as follows:

1. Your petitioner prays that a Writ of Certiorari to review the orders and decrees of the said Courts after a rehearing filed November 22, 1949, confirming the order of the District Court of the United States for the Western District of New York.

2. The opinion of the Court below decided November 2, 1949 in the said Court of Appeals, and the decision on the rehearing filed November 22, 1949, for convenience, are printed in an appendix to the brief which is filed with this petition.

3. Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1924, 43 Stat. 938, now Sec. 1254 U. S. C. A. new Title 28 (1948) (revision).

4. The opinion of the Court of Appeals for the Second Circuit was filed November 2nd, 1949 and petition for rehearing was filed November 22, 1949, no opinion on rehearing, and decree was entered.

Question Presented.

5. The fundamental questions presented in this petition are whether a County Court of the County of Erie in the State of New York, having before it a bill of complaint which names a defendant, a corporation of the State of New Jersey, found by the Court to have such rights and

interests in the subject matter of the litigation, namely real property, as would make it an indispensable party, may proceed to adjudicate its said rights in its absence, except for a Special Appearance, objecting to the jurisdiction because of non-service on an officer or director of said New Jersey corporation, without a hearing as provided by the Civil Practice Act of New York State.

As applied to the statutes under which the action was brought, the question is whether the New York State Tax Law Section 162, which provides one year for redemption after sale for taxes, by the owner, the plaintiff, City of Buffalo, may foreclose without notice as required by Rules 188, 190, 191, 192, and 230 of Rules of Civil Practice requiring the plaintiff to give notice of the entry of an order, and the entry of judgment thereon, and when defendant is a foreign corporation, as held adversely in *Powell vs. Home Seeker Realty Company,* 131 Misc. 590, 228 N. Y. Supp. 131. In disregard to said Rules and statutes, plaintiff entered judgment without a trial and without the required notices, and on an alleged default which did not occur because the time to answer had not commenced to run when no notice of the order or decision sustaining the service had been given. On appeal to the New York State Appellate Division the service of the summons was sustained without opinion, but notice of this decision was not served on your petitioner as required by the said Rules of Practice. Because of failure to serve copies of the orders of the County Court and Appellate Division, defendant, your petitioner had no time limit in which to file an answer to the complaint, and therefore was not "in default."

Petitioner had moved to open the alleged default and vacate the judgment by order to show cause with stay, but the sale of the property was held before the return

date stated in the said order to show cause. Petitioner attended the sale and made the highest public bid of buyers, also appearing specially, to buy in the property, but the City made a higher bid, which the local Referee accepted. Your petitioner thereby was deprived of its property without due process of law. A petition for removal to the United States District Court was then presented because of the acts of prejudice and local influence shown in the County Court. The District Court Judge held that the petition for removal had not been filed in time, holding that the alleged default was a "trial" of the action, but that Court overlooked the fact that there was *no notice* of hearing before the Referee in the County Court also that the *judgment was entered without notice* or *any notice of entry thereon,* and that the motion to vacate the alleged default judgment was denied by the County Court when these facts were before said Court. Such failure to give notice is held to be error in the case of Marking vs. New St. Lewis, 48 Fd. Supp. 680. If follows that from the County Clerk's record, the twenty days to answer, had not commenced to run when the petition for removal was filed and served, because *notice of entry and judgment* had *not been served,* and because the order of the Appellate Division on validity of service had not been served with notice of entry as rules require. Also, so held in Harter vs. Kernochan, 103 U. S. 562. It appears of record that the service of the summons was not filed until about seven months after the summons and complaint were filed. As there was no notice of hearing to the alleged default judgment, there could not have been a legal hearing or "trial."

Powell v. Home Seeker Realty, *supra.*

Petitioner in its proposed answer in the County Court alleged that the Charter of the City of Buffalo and Tax Law of New York provide a period of one year for the redemp-

tion of real property after sale for taxes, and tendered payment of such taxes and interest and costs accrued, and for this reason, petitioner did not receive "due process of law" as provided in the Constitution of the United States and of the State of New York.

Petitioner respectfully submits that the County Court never acquired jurisdiction of the petitioner-defendant, as held in the case of Conly vs. Mathieson, 190 U. S. 406, that the officer served, must be officially representing the corporation in its business within the state where service is made. Also held in Fitzgerald vs. Fitzgerald, 137 U. S. 98 and St. Clair vs. Cox, 106 U. S. 350.

The said judgment was voidable and can be vacated because it was entered without notice as required Rules of Civil Practice 188 and 190, and as held in Powell vs. Home Seeker Realty Co., 131 Misc. 590, 228 N. Y. Supp. 131, Selinger vs. G. C. Inc., 81 Misc. 343, 142 N. Y. Supp. 194.

WHEREFORE it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the Second Circuit, should be granted.

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Attorneys for Petitioner.

To Fred C. Maloney, Esq.,
Counsel for Respondent, The City of Buffalo.

YOU ARE HEREBY NOTIFIED that on the 21st day of February, 1950, the petitioner, Plainfield Hotel Corporation, filed in the Supreme Court of the United States, a petition for review on Writ of Certiorari of the decision of the Court of Appeals for the Second Circuit in the case in that Court in which Petitioner is Appellant and Respondent is Appellee, being cause No. 21337 on the docket of said Court.

Copy of said petition, of the printed record in said cause and of the brief in support of said petition are annexed or submitted herewith and are herewith served upon you.

Dated: January 27th, 1950.

JAMES P. KOHLER &
JAMES P. KOHLER, JR.,
Attorneys for Petitioner.

Service of the foregoing notice and of copies of the petition, brief and record therein specified is hereby acknowledged.

FRED C. MALONEY,
Attorney for Respondent.

February ....., 1950.

Opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20—October Term, 1949.

(Argued October 14, 1949 Decided November 2, 1949.)

Docket No. 21337

THE CITY OF BUFFALO,
Plaintiff-Respondent,

—against—

PLAINFIELD HOTEL CORPORATION,
Defendant-Appellant,

SPANN REALTY CORPORATION, E. W. WALTER, as nominee of CENTRAL HANOVER BANK AND TRUST COMPANY, THOMAS J. ATCHESON, doing business under the assumed name and style of T. J. ATCHESON GLASS CO., STATE TAX COMMISSION, THE PEOPLE OF THE STATE OF NEW YORK, BUFFALO SEWER AUTHORITY, COUNTY OF ERIE,
Defendants.

Before:

AUGUSTUS N. HAND, CHASE and FRANK,
Circuit Judges.

Appeal from an order of the District Court for the Western District of New York denying a petition for the removal of a suit in the state court. Affirmed.

FRED C. MALONEY, *Attorney for Plaintiff-Respondent.*

JAMES P. KOHLER & JAMES P. KOHLER, JR., *Attorneys for Defendant-Appellant, Plainfield Hotel Corporation, Appearing Specially.*

CHASE, *Circuit Judge:*

In October, 1946, the City of Buffalo brought suit in the County Court of Erie County, New York to foreclose tax liens upon real estate within that city upon which the appellant, a New Jersey corporation, had a mortgage lien or in which it may have had some interest. The appellant among others, was made a party defendant and service of summons was made upon it in February 1947. This service it sought to have vacated after entering its special appearance for that purpose in the state court suit. Its effort was unsuccessful and in December, 1947, on appeal to the Appellate Division of the New York Supreme Court the order denying its motion to vacate was affirmed. *Buffalo* v. *Plainfield Hotel Corp.*, 273 App. Div. 802. The appellant did not otherwise appear in the state court action.

On or about February 10, 1948, the state court referred the action to a referee for hearing and report on questions of fact and law. The referee filed his report, after hearing, on April 30, 1948. On the same day, the state court entered a judgment of foreclosure and sale, the judgment going against the appellant by default. A motion by the appellant to open the default was dismissed. After the denial of the motion to open the default the property was, on May 26, 1948, sold pursuant to the order of sale.

On August 16, 1948, the appellant filed its petition in the district court for removal, alleging as grounds diversity, a constitutional question, a separable controversy, and prejudice and local influence in favor of the plaintiff and adverse to appellant, the petitioner. The appeal is from an order of September 14, 1948 denying that petition.

As the new Judicial Code did not take effect until September 1, 1948, that is, after the petition for removal was

filed, the old Judicial Code seems applicable.[1] Section 29 of the old Code, 28 U. S. C. § 72, required the filing of the petition for removal in the state court "except [in] suits removable on the ground of prejudice or local influence" and, with the exception noted, that was the exclusive method of obtaining removal. The district court could remand a cause improperly removed by order of the state court but its power to order removal in the first instance was confined to the ground of "prejudice or local influence" and its power so to act flowed from Section 28 of the Old Judicial Code, 28 U. S. C. § 71. These two sections, 28 and 29, of the old Judicial Code were *in pari materia* and should be so construed. *Ex parte Bopst,* 4 Cir., 95 F. 2d 828. For this reason the court lacked the power to grant the petition for removal on any of the grounds stated except that of prejudice and local influence.

However, it might not be amiss to point out that the appellant lost nothing by its failure to file its petition in the state court at the time it was filed in the district court. It was too late then to petition the state court for removal on the grounds permitted by Section 29, for its time to answer or plead to the complaint in the action had then expired. The service upon it had been held good; its time to answer in compliance with Section 263 of the New York Civil Practice Act had expired; and there is nothing to show that it had been extended. We cannot assume that such a petition to the state court would have been granted. Even if it had been, however, the district court should, and doubtless

[1] It may be noted that under the new Judicial Code, local prejudice or influence is not a ground for removal. 28 U. S. C. A. § 1441; see Revisers' Notes to that section. Petitions for removal on the grounds that are available must be filed in the district court within twenty days after commencement of the action or service of process, whichever is later. 28 U. S. C. A. § 1446(b). Here, when appellant's petition for removal was filed, the twenty day period after service of process, which was the later, had long since expired. Thus, if the new Judicial Code were applicable, appellant's attempt to remove would have been too late.

would upon motion, have remanded the suit. *Quilhot* v. *Hamer,* C. C., N. D. N. Y., 158 Fed. 188. And its order would not have been reviewable. *Moulding-Brownell Corp* v. *Sullivan,* 7 Cir., 92 F. 2d 646, cert. denied, 305 U. S. 638; *Ex parte Bopst, supra.*

The only remaining question is whether the petition treated as one based on prejuidce and local influence should have been granted and the answer is found in the fact that it was filed too late. Section 28 of the old Judicial Code required such a petition not only to be filed in the district court but to be filed there "at any time before the trial thereof." Before this petition was filed, however, the suit had been tried in the state court by reference to a referee who had after hearing filed his report and judgment had been entered. The decision, provided valid service had been made upon the appellant, had become final and the judgment of foreclosure had been followed by the sale of the property. Appellant claims that the Appellate Division erroneously affirmed the order denying its motion to vacate the service. However, a decision relating to jurisdiction either of the person or of the subject matter is not subject to collateral attack where it was made in proceedings in which the jurisdictional questions were in issue and in which the parties were given full opportunity to litigate.[2] *Baldwin* v. *Iowa State Traveling Men's Association,* 283 U. S. 523; *Stoll* v. *Gottlieb,* 305 U. S. 165 (1938). Parenthetically, such a decision is in addition entitled to full faith and credit in the courts of another state, *Sherrer* v. *Sherrer,* 334 U. S. 343, and consequently in the courts of the United States. See *Pennoyer v. Neff,* 95 U. S. 714, 733; *Huron Holding Corp.* v. *Lincoln Mine Operating Co.,* 312 U. S. 183. Right or wrong,

[2] Appellant claims that appellee failed to give notice of the entry of the order of the Appellate Division, as, appellant contends, was required by Rule 188 of the New York Rules of Civil Practice. No contention or showing is made, however, that appellant lacked full opportunity to litigate jurisdictional issues.

the decision of the New York courts on the subject of personal jurisdiction over appellant is *res judicata* and binding here. Under such circumstances it is clear the requirement that the petition for removal be filed before trial in the state court was not fulfilled and it was, accordingly, properly denied. *Hanover Nat. Bank* v. *Smith,* C. C., S. D. N. Y., 11 Fed. Cas. No. 6,035; *McCallon* v. *Waterman,* C. C., E. D. Mich., 15 Fed. Cas. No. 8,675; *Neale* v. *Foster,* C. C., D. Ore., 31 Fed. 53, 56; see *City of Detroit* v. *Detroit City Ry. Co.,* C. C., E. D. Mich., 54 Fed. 1, 8.

Affirmed.

Decision.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

THE CITY OF BUFFALO,
Plaintiff-Respondent,
against

PLAINFIELD HOTEL CORPORATION,
Defendant-Appellant,

SPANN REALTY CORPORATION *et al.*,
Defendants.

Before:
AUGUSTUS N. HAND, CHASE AND FRANK,
Circuit Judges.

Petition for rehearing.

JAMES P. KOHLER AND JAMES P. KOHLER, JR., *Attorneys for Plainfield Hotel Corporation, Petitioner.*

Per Curiam: Petition denied.

A. N. H.
H. B. C.
J. N. F.
C. JJ.

Filed Nov. 22, 1949.

MEMORANDUM IN SUPPORT OF THE APPLICATION.

In the Matter
of
The Application of the PLAINFIELD HOTEL CORPORATION, a corporation of the State of New Jersey, for a Writ of Certiorari,

Petitioner,

against

The HONORABLE CARLTON A. FISHER and LESLIE F. ROBINSON, County Judges of the County of Erie of the State of New York, and of the Appellate Division, Fourth Department of the State of New York, and the HONORABLE JOHN KNIGHT, Judge of the United States District Court for the Western District of New York, and the other judges and officers of said Court and of the Court of Appeals for the Second Circuit.

Respondents.

POINT I.

The Importance of the Question:

The Appellant by its treasurer, F. Dudley Kohler, has had plans made for suitable apartments for the accommodations of veterans on this property. These plans and the specifications have been made by an architect by name of Albert A. Rumsschik of 263 Linwood Avenue, Buffalo, New York, and these plans have received the approval of the Federal Housing Administration, after several years of work and negotiation. The intention of the City of Buffalo Tax Department is to sell the lots for small frame houses which would accommodate a much smaller number of families and would not have the facilities which the apartments

would provide. Mr. Kohler is especially interested in this project for veterans because he is a veteran himself, and a member of the American Legion, Post 1026, State of New York, and is also an active member of the Veterans Corps of Artillery of New York which is part of the State National Guard. He became a member of the Sons of the Revolution of the State of New York in the year 1913 almost immediately after his graduation from Yale College. He was also a captain in the U. S. O. He refused to accept the veterans' bonus.

The estimated cost of this housing project is $1,130,000.

Appellant will be glad to submit copies of these plans and specifications to this Honorable Court, if so permitted.

POINT II.

Statement of the Case:

A petition for removal of this case from the County Court of Erie County, New York, with bond and affidavit, were all filed in the District Court of the United States for the Western District of New York, on August 16, 1948, with a Notice for an order of removal asked to be returned or settled on August 30th, 1948. An order denying the petition was entered September 14th, 1948 with costs.

The grounds for removal as stated in the petition are prejudice and local influence, diversity of citizenship, a constitutional question, and a separable controversy.

Notice of appeal from said order to the Court of Appeals for the Second Circuit, was filed October 13, 1948 with bond and Notice of Exceptions.

Notice of motion for rehearing was filed October 19, 1948 returnable October 25th, 1948 and opinion by Judge Knight

was filed January 11, 1949 and order denying January 18th, 1949.

Motion for a second rehearing was filed January 20th and returnable January 25, 1949, and order denying filed January 26, 1949.

March 2nd, 1949, Notice of Appeal from order denying rehearings.

The action in the County Court from which removal was sought, was commenced February 24, 1947 by the alleged service of a summons and complaint to foreclose tax liens on unimproved real property adjoining Houghton Park in Buffalo. The alleged service was made on one Frank Illich who made affidavit that he was not an officer nor director of the appellant corporation, and that it had no place of business and was not doing business in the State of New York, and objected to the jurisdiction on said grounds, and asked that said service be set aside, and appeared specially for such relief, on motion returnable March 31, 1947. The facts of this affidavit were not contradicted by the respondent City of Buffalo and they remain undisputed and true. *Said motion was denied* by the County Court *without taking any testimony or examination,* and an order entered May 5th, 1947, thereby showing *prejudice and local influence* against the Appellant, Plainfield Hotel Corporation. An affidavit by one Frank Eisner, the supposed process server, in opposition to said motion was submitted in opposition, but no copy of same was ever served on Appellant's attorneys appearing specially, as required by New York Rules of Civil Practice, Rule 65, although a copy of same was requested on May 14, 1947. There was *no option* on this motion. An appeal was taken May 26, 1947 to the Appellate Division, Fourth Department in Rochester, New York, which *affirmed* the County Court order with costs and with no opinion, which also showed *local influence and prejudice.*

On April 30, 1948, the respondent, City of Buffalo, without notice as required by Rules of Civil Practice, Rules 190, 191 and 192, entered judgment against appellant, and without notice of any reference, hearing, application or entry, all of which are required by said New York Rules of Civil Practice (Fols. 45-48).

That shortly thereafter on May 26, 1948, the Respondent offered said lands for sale at public auction at which time Appellant, appearing specially, made the highest public bid to buy, namely $14,100, but Respondent out-bid Appellant and bought in the land for its own account, showing prejudice against Appellant.

That the record of the County Clerk's Office May 7, 1948, shows that no notice of said proceedings was given (Fol. 48) as required by Rules of New York Civil Practice.

That on May 25, 1948, Appellant obtained an Order to Show Cause (Fol. 63) from said County Court returnable May 27, 1948, why said judgment should not be vacated, but said motion was called for hearing at 2 P. M. *the same day or two days before the return day,* and denied without opinion, and order entered denying, the same day, *showing more prejudice.*

Appellant appealed June 22, 1948 from said order to the said Appellate Division which *dismissed the appeal without opinion* and with costs (Fols. 65-66) showing *prejudice there also.*

The Petition for Removal dated May 14, 1948, was denied by Judge Knight, September 14, 1948, by order (Fol. 101).

The delay in paying taxes was because of bank failures in the depression years, and War restrictions which followed against building materials and F. H. A. restrictions, but previous to this time the taxes had been paid for nearly 100 years.

POINT III.

Constitutional Questions:

The provision for "due process of law" of the Constitution of the United States, has not been respected in this litigation. The City of Buffalo has disregarded the Rules of Civil Practice of the State of New York in failing to give notice of steps taken in this litigation and of orders and judgment which it entered, thereby cutting off the rights of the appellant to due process.

Article XIV of the United States Constitution, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life liberty *or property* without *due process of law,* nor deny any person within its jurisdiction, the *equal protection of the laws.*

POINT IV.

Right of Redemption:

The right of redemption is upheld by the highest Court of the State of New York in People *ex rel.,* Chase vs. Wemple, 144 N. Y. 478 in which it is held: "One who occupies * * * is entitled to notice of an application to redeem from a tax sale. The State comptroller has no authority to cancel an order of redemption under a statute authorizing him to cancel a tax sale." In Levy vs. Newman, 130 N. Y. 11: "The infant owner of land sold for taxes * * * was served with notice of sale and *failed to redeem within the time prescribed by the Act* * * *".

POINT V.

Constitutional Grounds:

The proceedings herein were *defective on Constitutional grounds:*

The *service of process* was not legally made on Appellant; the proceedings thereafter were not in accordance with Rule of Civil Practice and therefore *due process of law* was not performed by Respondent. It is held in Clark vs. Kirkland, 133 App. Div. 826, 118 N. Y. Supp. 315, 202 N. Y. 573: "Assessing land as nonresident, when there is a resident owner or occupant, to whom by Tax Law it should be assessed, is a defect affecting the jurisdiction on constitutional grounds, within sections 131 and 132, making a tax deed after two years conclusive of regularity of all proceedings, except as to *"any defect in the proceedings affecting the jurisdiction on constitutional grounds."*

POINT VI.

Tax Deeds Nonconclusive:

In the case of Adirondack League vs. Keyes, N. Y. Appellate Division, Fourth Department which includes City of Buffalo, it is held: "That section 131 is not limited to unrecorded conveyances and section 132 to recorded conveyances, but that both sections are to be so construed as to render tax deeds nonconclusive evidence in actions or proceedings brought to cancel them within five years *after expiration of the redemption period* • • •"

POINT VII.

The Only Interest Passing Was that Specified in Conveyance:

The Appellant herein, being an assignor of mortgagee, the interest was not conveyed because it had assigned the mortgage to Marion County, Tennessee Co-operative Corporation, by assignment of record, to which no notice or process was given by Respondent, and was not made a party to this foreclosure action, and its name is not mentioned in the tax conveyance. It is held in Sheldon vs. Russell, 91 Misc. N. Y. 278, 154 N. Y. Supp. 632, "Held that the only interest passing was that specified in the conveyance."

POINT VIII.

Notice of Redemption Not Given by County Treasurer as Required:

In Gabel vs. Williams, 39 Misc. N. Y. 489, 80 N. Y. Supp. 489, held to require a compliance with sections of the Tax Law at a sale * * * before the purchaser can dispossess the occupant or a mortgagee in possession. Where *a special act* prescribes *publication of notice to redeem* from *tax sale by the county treasurer,* and the general tax law requires a written notice * * * Laws requiring a purchaser at tax sale to give notice of redemption, though in words applying only to a sale made by the state comptroller, apply also to a sale by a county treasurer for state and county taxes.

POINT IX.

The Action to Foreclose Ought to Have Been Dismissed:

In *People* vs. *Adirondack Power & Light,* 134 Misc. 329, 235 N. Y. Supp. 271, it is held, that action by state, to recover possession of land claimed under a conveyance executed pursuant to tax sale *dismissed because of defective proceedings leading up to sale.*

A letter from the County Clerk, dated May 7, 1948, reads:

> "In the action of City of Buffalo vs. Spann Realty Corp., the register shows the following: October 22, 1946 summons & Comp.
> March 31, 1947 Affidavit of Service.
> May 12, 1947 Notice of Motion.
> May 29, 1947 Notice of Appeal.
> April 30, 1948 Judgment Roll.
>
> Very truly yours,
>
> Harry C. Vackel, County Clerk, by Thomas V. Lyons, Deputy Co. Clerk."

It follows from the above record, that the time to answer had not commenced to run *when the petition for removal was filed and served because the order of the Appellate Division on the validity of the service had not been served.*

POINT X.

The City Charter of the City of Buffalo is unconstitutional in so far as it provides for the sale of real property for taxes without the right of redemption and without due process of law, and contrary to State Tax Law Sec. 162.

POINT XI.

It was unlawful for the City of Buffalo to advertise the land for sale at public auction and then buy it in regardless of the highest bid from one of the public. When the best bid from the public is not satisfactory, the sale must be adjourned.

POINT XII.

The Special Appearance Was Proper:

It is held in Bernstein vs. Hakim, 126 Misc. 582, 214 N. Y. Supp. 82, "Motion to vacate a service of summons and complaint on the ground of plaintiff's fraud in obtaining service, is not a general but a special appearance."

In Banco vs. Escober, 135 Misc. 165, 237 N. Y. Supp. 267, "Service of notice of appearance by attorney for a non-resident defendant was construed as merely for the purpose of asserting the lack of jurisdiction, and was not a general appearance."

POINT XIII.

Appellant Not in Default:

The holding in City of Detroit vs. Detroit City Ry., 54 Fd. 1, does not apply to this case because defendant-appellant was not in default BECAUSE ITS TIME TO ANSWER HAD NOT COMMENCED TO RUN, because no notice of entry of the order had been given. Also that the time was waived by plaintiff-respondent in failing to give notices required by state law as held in Marking vs. New St. Lewis, 48 Fd. Supp. 680.

POINT XIV.

Appellant is Proper Party:

An assignment of mortgage permits the assignee to sue in name of the assignor as held in Fox vs. Peacock, 153 App. Div. 887, 138 N. Y. Supp. 535, "under N. Y. Code of Civ. Pro. Sec. 756 providing that in case of a transfer of interest, the action may be continued by or against the original party, unless the Court directs transferee to be substituted, an action may be continued on appeal against the original defendants though they assigned their interest in the subject matter and a motion to substitute the assignee as respondents, be denied."

POINT XV.

The County Court Never Acquired Jurisdiction of Appellant:

The case of *Conly vs. Mathieson,* 190 U. S. 406 "granting the existence of a cause of action, it is not every service *on an officer of a corporation* which will give a State Court jurisdiction of a foreign corporation. The residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. *He must be there officially representing the corporation in its business.* Service in New York of a summons on a director of a foreign corporation, who resides in New York is not sufficient to bring the corporation into Court where at the time of service the corporation *was not doing business in New York.*" Also Fitzgerald v. Fitzgerald, 137 U. S. 98; St. Clair vs. Cox, 106 U. S. 350.

POINT XVI.

The Judgment Was Not Entered as Required by Rules of Civil Practice, and Therefore Void:

The *judgment of foreclosure and sale* in this action was *entered without notice to Appellant,* as required by Rules of Civil Practice 188 and 190. The *alleged default* can be opened *after judgment and sale,* where no notice is given, see Powell vs. Home Seeker Realty Co., 131 Misc. 590, 228 N. Y. Supp. 131, Selinger vs. G. C. Inc., 81 Misc. 343, 142 N. Y. Supp. 194.

POINT XVII.

Appellant's Defenses to Foreclosure of Property:

The defenses to the complaint are that *Appellant appears specially to object to the jurisdiction* on the ground of *non-residence;* and *not doing business* in this State; that *Appellant tenders payment* of the amount claimed in full; that there is a *Constitutional question* involved in that it is being *deprived of its property without due process* of law, in *not having its day in Court* and judgment entered *without notice* of application or of entry, as required by Rules of Civil Practice 188 and 190; that it has a right *to redeem said property* as provided in Section 162, Tax Law of State of New York, and Charter of City of Buffalo which requires notice, Secs. 611 to 619 and 651, Art. 31.

POINT XVIII.

Appellant's Rights:

"The owner of mortgaged realty could appear in an action *to foreclose at any time* and such appearance entitled

her to notice of all subsequent proceedings." Irving Trust vs. Seltzer, 40 N. Y. Supp. 2nd, 451, 265 App. Div. 896, City of Buffalo vs. Kissinger, 40 N. Y. Supp. 2nd 188.

"A defendant in a foreclosure action can appear after default."

Emigrant Sav. Bank vs. Van Bokkelen, 269 N. Y. 110.

"A defendant who entered a special appearance is not deprived of his right to object to the jurisdiction by delaying until after rendition of a judgment for want of appearance." Powell vs. Home Seeker R. Co., 131 Misc. 590, 228 N. Y. Supp. 131.

POINT XIX.

Notice of Application for Judgment is Necessary:

No notice of application for judgment was given as required by Rule 190 Rules of Civil Practice. Selinger vs. G. C. Inc., 81 Misc. 343, 142 N. Y. Supp. 194, Mahnk vs. Blanchard, 233 App. Div. 585, 253 N. Y. Supp. 307; Also required by Rule 188; *Re:* Levy, 54 How. 129.

POINT XX.

Right to Challenge Service in State Court Not Waived:

"A defendant by removal to the Federal Court, does not lose the right to challenge the *invalidity of the service in the State Court.* Whether service on a foreign corporation was valid under New York decisions depended on whether a corporation was 'present' in the state by virtue of those activities which it there set in motion, Homze vs. Nardis, 165 Fd. Rep. 2nd 33.

"If it appears on the record that the case is removable and the statute has been complied with USC 28:72 it is the *duty of the State Court to proceed no further,* it may not try the allegations of the removal petition, Kern vs. Huidekoper, 103 U. S. 148, Ches. & O. R. R. vs. Cockrell, 232 U. S. 146.

"After the defendant has filed in the State Court the *removal petition* as described above with a *proper bond* the Federal Court acquires and the state court loses jurisdiction of the case, William vs. N. Y. & R. Co., 11 Fd. 2nd 363, Morgan vs. Kroger Grocery, 96 Fd. 2nd 470.

"*It is not necessary* that the state *court grant an order of removal* B. & O. R. R. vs. Koontz, 104 U. S. 5."

POINT XXI.

Conclusion:

The want of jurisdiction of the County Court over Appellant, the lack of legal service of process, the failure to give notice of application for reference and judgment, the lack of due process of law, the evidence of prejudice and local influence against the non-resident Appellant, the violation of Constitutional rights, the right of redemption, it is respectfully submitted that a writ as prayed for by the petitioner should be issued as the only means to protect the rights of this petitioner to which under the Constitution and laws it is entitled.

Dated: February 14, 1950.

Respectfully submitted,

JAMES P. KOHLER & JAMES P. KOHLER, JR.,
Attorneys for Petitioner.